

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION**

FREDERICK E. BLACK,

Petitioner,

v.

Case No. 09-cr-20093

Hon. Gerald E. Rosen

Mag. R. Steven Whalen

UNITED STATES OF AMERICA,

Respondent.

**ORDER ADOPTING MAGISTRATE JUDGE'S REPORT AND
RECOMMENDATION DISMISSING DEFENDANT'S 28 U.S.C. § 2255 MOTION**

At a session of said Court, held in
the U.S. Courthouse, Detroit, Michigan
on December 7, 2010

PRESENT: Honorable Gerald E. Rosen
Chief Judge, United States District Court

On November 16, 2010, Magistrate Judge Paul Komives issued a Report and Recommendation ("R & R") recommending that the Court dismiss without prejudice as premature Defendant Frederick Black's motion under 28 U.S.C. § 2255 to vacate his sentence and deny a certificate of appealability. Defendant did not file any objections to the R & R. The Magistrate Judge based his R & R on the Sixth Circuit rule requiring extraordinary circumstances for the district court to consider a § 2255 motion during the pendency of a Defendant's direct appeal with the circuit court. *Capaldi v. Pontesso*, 135 F.3d 1122, 1124 (6th Cir. 1998). Defendant filed a notice of appeal with the Sixth Circuit on April 30, 2010, and his appeal remains pending in that court, docketed as Case No. 10-

1601.

Having reviewed the R & R, as well as the parties' submissions in support of and opposition to Petitioner's underlying § 2255 motion, the accompanying exhibits, and the record as a whole, the Court fully concurs in the Magistrate Judge's analysis, and finds no extraordinary circumstances exist to grant Defendant's motion.

NOW, THEREFORE, IT IS HEREBY ORDERED that the Magistrate Judge's November 16, 2010 Report and Recommendation [Dkt. # 67] is hereby ADOPTED by the Court.

IT IS FURTHER ORDERED that Defendant's motion to vacate sentence under 28 U.S.C. § 2255 [Dkt. # 60] is DISMISSED without prejudice.

SO ORDERED.

s/Gerald E. Rosen
Gerald E. Rosen
Chief Judge, United States District Court

Dated: December 7, 2010

I hereby certify that a copy of the foregoing document was served upon counsel of record on December 7, 2010, by electronic and/or ordinary mail.

s/Ruth A. Gunther
Case Manager
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